

Exhibit A



August 30, 2019

Via Mail and E-Mail

Mr. Michael Marquis
Freedom of Information Officer
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Request under the Freedom of Information Act

Dear Mr. Marquis:

The Center for Reproductive Rights makes this request pursuant to the Freedom of Information Act, 5 U.S.C. §552, and implementing regulations of the U.S. Department of Health and Human Services (“HHS”), 45 C.F.R. Part 5.

Under the Trump administration, HHS created a new division within the Office for Civil Rights (“OCR”) known as the Conscience and Religious Freedom Division (“CRFD”). In both its Fiscal Year 2019 and 2020 budget requests, the OCR sought to increase the budget of the CRFD by over \$1 million,¹ even as the budgets for other divisions of the OCR, as well as the

¹ Dep’t of Health & Human Servs., Office for Civil Rights, Fiscal Year 2019 Justification of Estimates for Appropriations Committees [hereinafter, “OCR FY 2019 Budget Request”] at 19, <https://www.hhs.gov/sites/default/files/fy2019-ocr-congressional-justification-accessible.pdf>; Dep’t of Health & Human Servs., Office for Civil Rights, Fiscal Year 2020 Justification of Estimates for Appropriations Committees [hereinafter, “OCR FY 2020 Budget Request”] at 20, <https://www.hhs.gov/sites/default/files/fy-2020-cj-compilation.pdf>.

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OCR's overall budget, were considerably reduced.² The CRFD explained in its 2019 and 2020 budget justifications that its requested increase was necessary to pay for additional full-time employees.³

The Center for Reproductive Rights seeks to better understand the staffing and resources allocated to the CRFD.

Records Requested

Please provide all responsive records from January 20, 2017 through the present. As used herein, the word "records" means all records as defined in 22 C.F.R. §171.1(b)(1). Additionally, as used herein, any reference to the OCR or CRFD encompasses all regional offices as well as the central offices located in Washington, D.C.

We request the following to be produced within twenty business days:

1. Records sufficient to identify all employee positions allocated either in full or in part to the CRFD, or otherwise tasked with conducting the work of that division, including records sufficient to show:
 - a. The title and classification for each position;
 - b. The job description and required qualifications;
 - c. The salary range for each position;
 - d. Whether the position was full- or part-time;
 - e. The location of each position;
 - f. Whether the position shared responsibilities with any other OCR division; and

² See Office for Civil Rights Operating Plan for FY 2019, <https://www.hhs.gov/sites/default/files/fy-2019-ocr-operating-plan-web-version.pdf> (indicating a budget reduction compared to the 2018 Fiscal Year).

³ OCR FY 2019 Budget Request at 7; OCR FY 2020 Budget Request at 7.

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- g. When and whether each position was filled or vacant during the relevant period;
- 2. For each individual holding a position identified in response to 1.g. as having been filled:
 - a. The resume provided by the individual to the agency in connection with determining the appropriate salary for the individual, or, if that is not available, any recent resume contained within the agency's records;
 - b. Any conflicts or ethics waivers or authorizations for the individual employee;
 - c. Records reflecting any recusal determination made or issued for the individual; and
 - d. Copies of any SF-50 forms for the individual reflecting any change in position or title, including when the employee enters or leaves a position. We have no objection to the redaction of home addresses, telephone numbers, or social security numbers from the SF-50s;
- 3. All records, documents, memoranda, and communications concerning the number of employee positions allocated to the CRFD in full or in part, including any records discussing justifications for increasing, decreasing, or maintaining the number of positions allocated;
- 4. Records sufficient to identify any employee position previously allocated to another division within the OCR that was re-allocated to the CRFD either in full or in part, or otherwise tasked with conducting the work of that division;
- 5. All records, documents, memoranda, and communications concerning the re-allocation of any employee position to the CRFD from another division of the OCR, including any records discussing the justification for such re-allocations;
- 6. Records sufficient to show the compensation provided to each employee allocated either in full or in part to the CRFD, or otherwise tasked with conducting the work of that division;
- 7. All records, documents, memoranda, and communications concerning CRFD's recruitment and hiring practices;

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8. Records sufficient to identify any contractors working with the CRFD, including records sufficient to show:
 - a. The number of contractors;
 - b. The employers of each individual and the identity of each entity;
 - c. The location of each contractor;
 - d. The role and responsibilities of each contractor; and
 - e. The payment terms for each contractor;
9. All records, documents, memoranda, and communications concerning CRFD's retention of contractors, including any records discussing the justification for using contractors, and the process for recruiting and selecting contractors;
10. Records sufficient to show with specificity the amount and sources of funding received or used by the CRFD, including records identifying personnel and non-personnel funds from the following sources:
 - a. Funds allocated to the OCR generally;
 - b. Funds allocated to the CRFD specifically; and
 - c. Funds originating from enforcement actions or settlement agreements conducted by any division or agency; and
11. Records sufficient to show the CRFD's monthly and annual allocation and use of personnel and non-personnel funds.

The Center for Reproductive Rights seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

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In addition to the records requested above, the Center for Reproductive Rights also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Please search all records regarding agency business. You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; the Center for Reproductive Rights has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.

Please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches. Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools would capture that email under Capstone.

Accordingly, the Center for Reproductive Rights requests that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. The Center for Reproductive Rights is available to work with you to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

We request that you produce all responsive materials in their entirety; however, should you determine the materials contain information which falls within the statutory exemptions provided in 5 U.S.C. §552 or 22 C.F.R. §171.11, we request the information be reviewed for possible discretionary disclosure. We furthermore request that all reasonably segregable portions of the exempt material be provided. We request that any deleted material be described in detail, and that you specify the statutory basis for the denial as well as your

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reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” If it is your position that any portion of the requested records is exempt from disclosure, the Center for Reproductive Rights requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁴ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁵ Further, “the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.”⁶

You should institute a preservation hold on information responsive to this request. The Center for Reproductive Rights intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, your agency is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, the Center for Reproductive Rights welcomes an opportunity to discuss their request with you before you undertake your search or incur search or duplication costs. By working together at the outset, the Center for Reproductive Rights and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Waiver or Limitation of Fees

We request a waiver (or, in the alternative, a reduction) of all fees under 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure of the information would be in the public interest by

⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (emphasis in original).

⁶ *Id.* at 224 (internal quotation marks omitted).

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contributing significantly to the public understanding of the staffing and resource allocation of the OCR and the CRFD.

The Center for Reproductive Rights does not make this request for commercial use. 45 C.F.R. § 5.54(b)(3). As a 501(c)(3) nonprofit organization, the Center for Reproductive Rights does not have a commercial purpose and the release of the information requested is not in the organization's financial interest.

Founded in 1992, the Center for Reproductive Rights is the only global legal advocacy organization dedicated to reproductive rights, and its litigation and advocacy has played a key role in expanding access to reproductive health care around the world. The Center for Reproductive Rights uses information gathered, and its analysis of information gathered, to educate the public through reports, press releases, or other media, as discussed above. Likewise, the Center for Reproductive Rights also makes the materials gathered available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter. The Center for Reproductive Rights has demonstrated commitment to the public disclosure of documents and creation of editorial content.

Accordingly, the Center for Reproductive Rights qualifies for a fee waiver.

Further, the Center for Reproductive Rights will disseminate the information to “a reasonably broad audience of persons” through our social media accounts and our websites. If a waiver or reductions in fees is not granted on the basis of the disclosure being in the public interest, we request a waiver (or, in the alternative, a reduction) of all fees under the “representative of the news media” exception in 5 U.S.C. § 552(a)(4)(A)(ii)(II). The term, “representative of the news media,” as used in the Freedom of Information Act, is defined as any person or entity “that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii).

The Center for Reproductive Rights publishes a regular newsletter that currently has over 215,000 subscribers. Additionally, the Center for Reproductive Rights routinely gathers information from government and other sources and uses that information to publish reports, briefing papers, fact sheets, periodicals, articles, blog posts, and other educational materials, which are readily available to the public through the Center for Reproductive Rights' website (www.reproductiverights.org) and social media accounts (for example, on the Center's Twitter stream @reprorights). During a representative month in 2018, the Center for Reproductive Rights has had over 60,000 visits leading to over 110,000 page views – of which nearly 40,000 were unique visitors. Additionally, the Center has well over 95,000 followers on Twitter.

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Accordingly, the Center for Reproductive Rights requests that we be accorded “representative of news media” status and that any fees accrued for this request be waived, or alternatively, reduced.

In the event that you determine you are unable to waive the fees, please provide us with prior notice if the total fees authorized will exceed \$200 so that we can discuss arrangements.

* * *

Conclusion

The Center for Reproductive Rights looks forward to working with your agency on this request. Thank you for your prompt attention to this matter.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Center for Reproductive Rights requests that responsive materials be provided electronically by email or in PDF or TIF format on a USB drive. Please send any responsive material being provided and acknowledgement of receipt of this request to:

Katherine Gillespie
Center for Reproductive Rights
1634 Eye Street, NW
Washington, DC 20006
Phone: (917) 637-3718
Email: kgillespie@reprorights.org

If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Katherine Gillespie at (917) 637-3718. Thank you for your assistance.

Sincerely,

Katherine Gillespie
Senior Federal Policy Counsel
Center for Reproductive Rights